IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE BORDEN COMPANY, *Respondent*

BRIEF FOR THE RESPONDENT

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MISCELLANEOUS:

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented

The respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but commercially less acceptable product which the respondent (like all other producers and handlers of that product) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act applies only to price discrimina-

tion in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the court of appeals correctly held that the premium product and the non-premium product were not of like grade and quality within the meaning of the statute.

Statement

The premium brand market and the private label market. In the market place, Borden brand and private label evaporated milk were sharply different products. Borden brand, on the market for over 70 years, was one of the three premium brands, universally recognized as such throughout the industry. Private label, too, had long been established as a separate entity in the market. Many wholesalers and retailers had their own private labels and the product was packed for them by any one or more of some 25 producing firms (R. 978-79, 19, 145-46, 156-57, 880-84).

All packers of private label sold that product at prices substantially below the premium brand price, for the simple reason that they had to, in order to sell the product at all. All wholesalers and retailers, large and small, expected to get private label for less than the premium brand price, and they knew that they would in turn have to resell private label for less. Private label was not "the same thing" for less money. It was a different product; and the purchasers of private label from the respondent, at the lower prices, continued to buy Borden brand, at the higher prices, in

undiminished quantities (R. 431-34, 478-81, 943). As one of the Commission's wholesaler witnesses put it, at the trial of this case:

> "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk]. . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have $1.50 or $2 a case spread to make it interesting." (R. 330-32; quoted by the court of appeals at R. 979)

The amount of the spread, referred to by this witness, was somewhat greater (as the hearing examiner found, R. 54) than any difference between the respondent's prices for Borden brand and its prices for private label.*

The reasons why Borden brand evaporated milk was a premium product. The clear differentiation between the two products, made by wholesalers and retailers, was simply a consequence of the fact that consumers demanded Borden brand and were willing to pay a substantially higher price for it than for the private label product. The reasons for this preference are clear in the record. The consumer confidence in the Borden brand name and in the company behind it was grounded in factors such as long and favorable experience with the Borden product, unfavorable experi-

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* The maximum difference claimed by counsel supporting the complaint was $1.4519 per case (the amount shown at R. 807, line 2, after making the admittedly appropriate deductions, R. 412-16, of $.1320 for cash discounts and $.0800 for labels).

ences with private labels, and physicians' recommendations as to the best brand for infant feeding, as well as the respondent's advertising and promotional efforts (R. 978-79, 24-25, 230, 246-47).

Basic to the strong consumer demand for the Borden brand product was the fact that for many years the respondent had taken special pains to make sure that its premium product reached the ultimate consumer in perfect condition. When the respondent in its packing plants put the same milk in the Borden brand and in the private label cans, they were still a long way from the consumer; and evaporated milk is perishable. It must be kept under controlled conditions, and it must not be allowed to remain too long either in storage or on grocers' shelves. Otherwise, it may develop a stale or "canned" taste or become discolored, stringy, curdled or sour. Consumers, unable to test the quality of the contents before making the purchase and opening the can, necessarily place considerable reliance on the brand names and the companies behind them (R. 24-25, 675-76).

To assure the continued high quality of its Borden brand product as it came into the hands of the consumer, the respondent rigorously policed the flow of that product throughout the channels of distribution. Great care was exercised to see that it was stored under optimum conditions and that it was moved toward the consumer with the minimum of delay. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses. In addition, the respondent had more than 200 representatives out in the field, going into the

retail stores and making code dating and sampling checks of the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544, 674-76).

With respect to private label, on the other hand, this responsibility lay with the wholesaler and retailer handlers. The respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions. The respondent did nothing more, and it took no responsibility for the product after it left the factory door (R. 20-21, 61-62).

The private label product was sold f.o.b. plant, with only the purchaser's label on it. The respondent's name nowhere appeared on it, and any use of the respondent's name in connection with that product was prohibited, both by the respondent and by its private label customers. The respondent wanted it that way because it could not guarantee the ultimate quality of the product and did not wish to risk any tarnishing of its valuable name by reason of anything that might happen to the product in the channels of distribution. The private label customers wanted it that way in order to be in a position to build up their own consumer goodwill and also because they wanted to be free to shift suppliers at any time. The consumers obtained the information important to them: *viz.*, where to place the responsibility in the event that any of the product failed to reach them in good condition (R. 61-62, 485-86, 519-22).

The wholesaler and retailer purchasers of Borden brand and of private label. There were over a hundred wholesalers among the private label customers, as well as a smaller number of chain store warehouses and

retailer-owned buying groups. One of these groups, whose purchases accounted for more than 10% of the respondent's private label volume, had over 1,000 retailer members.* The wholesaler purchasers of private label in turn offered that product to their retailer customers, just as they did the Borden brand which they purchased from the respondent. The evidence, adduced with respect to a particular one of these numerous wholesaler purchasers, shows that it affirmatively offered the private label to each of its 600 retailer customers, some of whom purchased the product and most of whom did not (R. 424, 431-34, 809-15).

As the Commission notes in its brief (page 4), there is no evidence that the respondent refused to sell private label to any purchaser who requested it.**

The proceedings in the Commission. The respondent commenced packing the private label product in a number of its plants in about 1938. The private label was sold on an f.o.b. plant basis, with prices determined under a cost-plus formula. The Borden brand, like the other two premium brands (Carnation and Pet), was sold on a delivered price basis which was uniform throughout the country (R. 19-21, 522-23, 527-28).

The handling of the two different products gave rise to no problem until in 1956 and 1957 the respondent expanded its private label operations to include its two southern plants, located at Lewisburg, Tennessee and

* Central Retailer-Owned Grocers, whose private label purchases are shown at R. 941; see *National Retailer-Owned Grocers, Inc.*, FTC Dkt. 7121, Initial Decision, p. 5 (October 13, 1961), as to the number of members.

** In instances where the respondent did not have the necessary production available when a request was received, such prospective customers were informed when supplies later became available (R. 541-42).

Chester, South Carolina. The respondent's costs at those plants were lower than at its midwestern and other plants, and under its private label pricing formula its customers in the southern area received the benefit of that saving as well as the substantial savings in freight. The result was that some private label business, previously served by other packers from faraway plants in the midwest, shifted to the respondent (R. 32-47). This litigation ensued.

The issues framed by the Commission's complaint (dated April 22, 1958) and the respondent's answer were whether Borden brand and private label were "of like grade and quality", whether the challenged differences in the respondent's prices for the two products were competitively injurious, and whether in any event such price differences were cost-justified.

After a trial extending over a period of almost three years, the hearing examiner ordered the complaint dismissed on the grounds that (a) there was neither injury nor reasonable probability of injury to competition in either the primary or the secondary line (R. 57), and (b) the challenged price differences were cost-justified (R. 74).

The Commission, in a decision joined in by only two of the five Commissioners, with one dissenting and two not participating, held that Borden brand and private label were of like grade and quality, that there was injury to competition in both the primary and secondary line, and that the respondent had not established its cost justification defense (R. 128).

The court of appeals decision that Borden brand and private label were not of like grade and quality. All issues were thoroughly briefed and argued before

the court of appeals, which on December 4, 1964 set the Commission's order aside on the threshold ground that Borden brand and private label were not of like grade and quality within the meaning of the statute (R. 985). It is that holding which is now before this Court for review.

The absence of competitive injury. Although the Commission in its brief (pages 10, 19-20) correctly emphasizes that the competitive injury issues are not before this Court, the Commission's extensive references to those issues necessitate a brief indication of the facts which led the hearing examiner to order the complaint dismissed for lack of competitive injury, and which led the court of appeals to observe, at the close of its opinion, that the respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (R. 985).

As to the claimed injury in the producer or primary line of competition, the evidence showed some shifting of private label business to the respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share, sold larger amounts of private label than before, and sold it at higher prices (R. 34-50, 753-88).*

* The competitor who ceased production (Comm. Br. 6) had an almost doubled sales volume in the very year when some of his business shifted to the respondent (which had the geographical advantage in respect of practically all of such shifted business); and that competitor's representative, as the hearing examiner noted, blamed his company's unfavorable geographic location, and not the respondent, for his company's decision to cease production (R. 41-42).

As to the claimed injury in the customer or secondary line of competition, the Commission proceeded on the assumption that, as in *Morton Salt**, the case involved goods which were alike in the market place as well as in physical composition. That assumption was manifestly incorrect, as the record shows and as the hearing examiner recognized; and the record further shows (see pages 30-33 below) that whatever competitive effects might be thought to have flowed from the selling of these two different products at different prices, they were of a totally different kind from those with which Congress was concerned: *viz.,* those resulting from the selling of like goods at different prices.

As to the respondent's cost justification defense, deemed sound by the hearing examiner after many months of litigation on that issue but rejected at the Commission level, the court of appeals observed at the close of its opinion that the respondent's arguments "seem to have considerable merit" (R. 985).

Introduction and Summary

The basic issue, as stated by the court of appeals (R. 979), "is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination." The court stated that "as a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics", and that it is "both proper and consistent with the broad antitrust policy of Congress that they be given

* *FTC* v. *Morton Salt Co.,* 334 U.S. 37 (1948).

recognition under the 'like grade and quality' test of the Act." The court concluded that

> "In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." (R. 980-81)

Applying that test to the thoroughly demonstrated facts of this case, the court of appeals found it apparent that Borden brand and private label were different products in the market place and therefore not of like grade and quality within the meaning of the statute. The Commission does not question that the market facts proved on this record, if taken into account, do indeed call for that conclusion. The Commission's complaint is that the court should have totally excluded the market facts from consideration.

The effect of the court of appeals decision is to permit the respondent to continue to make private label evaporated milk available to all who want it; to sell that product at prices determined by all the market factors relating to that product; and, in those areas where the proximity of the respondent's plant gives it an advantage over packers shipping from distant plants, to provide cheaper private label for those consumers who want to buy that product.

The effect of an affirmance of the court of appeals decision would be simply to reconfirm that market as well as physical facts are to be taken into account in making the jurisdictional determination under Section 2(a). The Commission would remain entirely free, as

always, to consider each new case on its own facts; and where such facts indicate mere artificial differences rather than the genuinely significant differences shown in this case, the Commission would have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

Contrast, then, the position taken by the Commission before this Court.

The Commission does not and could not question that (a) Congress intended the prohibitions and restrictions of Section 2(a) to be applicable only where different prices are charged for the same product; (b) the threshold question is whether the different prices are being charged for the same product or for different products; and (c) where it is determined that the products are different, that is the end of the inquiry under the statute, and none of the ensuing provisions—competitive injury, meeting competition, cost justification, etc.—has any application.

Yet the Commission now asks this Court to lay down a flat rule that in determining the applicability of this statute no attention shall be paid to any of the market facts—the very facts that are of most crucial significance to actual buyers and sellers of products in the market place. No matter how thoroughly a separate market for a private label product may have been established; no matter how many other producers may be selling in that private label market; no matter how clearly it may be shown that all producers of private label must sell that product at substantially lower than premium product prices, if they are to sell at all; no

matter what plant location or other economic advan-tages a premium brand producer may be able to mak[e] available to wholesalers and retailers wishing to handl[e] the private label product; no matter how many of suc[h] wholesalers and retailers may wish to handle th[e] cheaper private label product which can thus be mad[e] available to them; no matter what lower prices can thu[s] be brought about for customers who may wish to bu[y] the cheaper private label product—none of this, unde[r] the flat exclusionary rule sought by the Commissio[n] would make any difference.

Under that rule, no seller operating in a premiu[m] product market could sell private label with an ey[e] solely to the market for that product. At every tur[n] such a seller would have to keep an eye to the competi-tive fortunes of all other private label producers, bein[g] careful not to sell to any wholesaler or retailer in cir-cumstances which might later be claimed to have harm-fully diverted business away from some other less ad-vantageously situated private label producer. And a[t] the same time, such a seller would have to keep an ey[e] to the situation of each of his customers, lest for ex-ample it later be claimed that a customer to whom sale[s] of private label could not be made for fear of divertin[g] business from some primary line competitor wa[s] harmed in his competition with some other custome[r]. In short, under the rule sought by the Commission, n[o] seller operating in a premium product market coul[d] compete in a private label market except at the risk o[f] expensive and protracted "injury" and "cost justifica-tion" litigation, and under the peril of severe injunc-

tive restrictions, if the Commission in the light of information developed at the trial should formulate conclusions adverse to the seller.

Needless to say, a rule so obviously fostering "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"* should not be adopted unless clearly compelled by the statutory language itself, the legislative history, the over-all statutory design, or established judicial or administrative precedent.

The fact is that every one of these criteria compels the contrary conclusion and supports the decision of the court of appeals. The language of Section 2(a), considered in the light of the statutory purpose and legislative history, shows that the question whether goods are "of like grade and quality" so as to be within the reach of the statute turns upon the facts as to whether the goods have the same value in the market so that they would normally be sold at the same price. Mere physical similarity is not enough if in fact the goods cannot command the same prices in the channels of distribution.

This view of the statute is consistent with all the administrative and judicial precedents and with the design and objectives of the Robinson-Patman Act. It also serves to harmonize that Act with the broader antitrust policies laid down by Congress by leaving producers free to compete at price levels resulting from the normal play of market forces.

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* *Automatic Canteen Co.* v. *FTC,* 346 U. S. 61, 63 (1953).

ARGUMENT

I. The Court of Appeals Correctly Held, o the Record before it, That Private Label Evapo rated Milk Was Not of Like Grade and Qualit with Borden Brand Milk.

A. Congress intended that the market facts as well a the physical facts should be taken into account i determining whether Section 2(a) may have an application.

The language of the statute. The subject matter o Section 2(a) is prices at which commodities are sol The section, however, is not a general price-fixing o regulatory statute. It deals only with the charging o different prices for "commodities of like grade an quality." Determinations of *grade* and *quality* are es sentially value judgments. They have to do with th relative acceptability of goods, which may be based upo physical differences or upon other factors deemed im portant by buyers and sellers of goods in the market.

Congress desired to protect small buyers agains harmful uses of the buying power of large firms, an at the same time did not intend to interfere with th normal competitive processes whereby prices are deter mined by the actions of buyers and sellers in the marke The statutory language is well designed to carry ou these intentions. The jurisdictional phrase limits th prohibitions of the statute to situations where differen prices are being charged for goods which all buye would normally expect to be able to get at the sam price. At the same time, the jurisdictional words "mak it clear that a seller may charge different prices fo

products having significant variations in grade and quality"*, and therefore normally selling at different prices.

It is an unquestioned fact that the marketability of a product and the price at which it can be sold depend not only on its physical characteristics but also on the opinion in which buyers hold it. This was brought out by Judge Learned Hand in a decision under another trade regulation statute, handed down at the time when the Robinson-Patman amendment was pending before Congress. Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

> "Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it." *Borden's Farm Products Co.* v. *Ten Eyck,* 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff'd,* 297 U.S. 251 (1936)

The Commission itself has recognized the same thing as recently as 1964. In *Callaway Mills*** the Commission pointed out, in a case involving Section 2(b), that a realistic comparison of the pricing of two products must take into account not only the "intrinsic superior quality" of one product over another but also the "intense public demand" that may exist for one product as compared with another. Expressly relating these two distinct considerations to the "grade and

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* Comm. Br. 12.

** *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.,* CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800 (FTC Dkt. 7634, Feb. 10, 1964).

quality" of the products, the Commission assigned to the "quality" concept the "intrinsic" or physical characteristics of a product, and to the "grade" concept the "public demand" or "saleability" characteristics of a product. TRADE REG. REP. TRANSFER BINDER, at p. 21, 755.

Likewise some members of the Attorney General's National Committee to Study the Antitrust Laws, urging that "significant consumer preferences" be taken into account under the grade and quality provision of the statute, regarded demonstrable economic differences as calling for evaluation "under the statutory term 'grade' as distinct from any purely physical consideration of 'quality'."*

To the same effect is Rowe. Pointing out that products are not of like grade and quality if there are commercially significant differences between them, Rowe emphasizes the statutory term "grade" as encompassing these market value factors. Rowe's statement is as follows:

> "Considerations of 'quality' aside, the requirement of 'like grade,' whose real import was never legislatively clarified, appears sufficiently plastic to take account of any other commercially significant distinctions—whether physical or promotional differentiations affecting market value. 'Like grade' is thus readily equated with 'commercial fungibility.'
>
> "So construed, the statutory condition of 'like grade' would exempt those non-'fungible' goods differentiated significantly in physical components or promotional appeal." Rowe, Price Discrimination Under the Robinson-Patman Act 76 (1962)

* Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

Regardless of the precise connotation to be assigned to each of the two terms, the fact that Congress used both terms undoubtedly strengthens the view that Congress intended that the jurisdictional determination should not be limited to the consideration of physical facts alone but should encompass all factors affecting value. The view is further strengthened by the fact that the original Clayton Act permitted a seller to defend his differing prices on the grounds, among others, that the commodities were different in "grade" or in "quality". 38 Stat. 730 (1914). The Robinson-Patman amendment retained both conditions, stated them in the conjunctive and put upon the plaintiff the burden of proof. Thus, under the original Clayton Act the defendant could justify his price discrimination by showing differences in either grade or quality. Under the Robinson-Patman amendment the plaintiff must demonstrate likeness in both grade and quality.

The legislative history. The legislative history, far from providing support for the Commission's contention that all market facts are to be totally excluded from the jurisdictional determination under the statute, shows exactly the contrary. The history shows that "grade" and "quality" remained as separate criteria under the Robinson-Patman Act, and thus that products different in grade or different in quality were not to be deemed of like grade and quality under the statute. Further the history evidences the Congressional concern that the actual facts as to the standing of products in the market place, and not mere rules of thumb based on the presence or absence of physical differences or of

particular brand names, should be controlling. And finally, the history shows that there was specific consideration and approval of the very kind of premium brand-private label operation which the Commission has challenged in this present case.

Mr. Teegarden, generally recognized as the draftsman of the statute (Comm. Br. 14),* explained the significance of market as distinguished from purely physical facts in determining the applicability of the statute, and sharply differentiated between "different grades" on the one hand and "different qualities" on the other, in the following language:

> "27. Question. Would the proposed amendment [the Patman bill] require the same prices and terms on purchases for future delivery as on spot purchases either at the time of the contract or at the time of the delivery?
>
> "Answer. No. The bill does not affect the relationship between future and spot purchases. They are different things and are based on *market conditions* at different times or relating to different times. It would require equal treatment of spot buyers of the same goods at the same time. It would require the equal treatment of future buyers of the same goods, buying at the same time and in the same future. But it leaves open and un-

* Mr. Teegarden, whose authorship of the Patman bill was expressly confirmed by Congressman Patman (*Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 9 (1935)), was active before the various Committees of the Congress throughout the consideration of the legislation, as shown, for example, *id.* at 14-29, 30-39, 200-36, 244-69 and in the *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 2d Sess., ser. 10, pt. 2, at 446-70 (1936).

> touched the prices and terms relationship between different futures and between spots and futures, just as it does between *different grades* and *different qualities*. No protection is needed in this respect, since if a seller offers a price differential disproportionate to the real differences involved, the buyer can always choose the future *or the grade or the quality* offering the best price and terms." *Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess., ser. 10, pt. 1, at 36 (1935) [Italics added.]

The rejection of the "and brands" proposal, relied upon by the Commission at pages 14-15 of its brief, is further evidence that no formalistic rules of thumb were to be employed in the application of the jurisdictional criteria. Under that proposal, Section 2(a) would have been applicable only to the charging of different prices for "commodities of like grade, quality and brand." Obviously the adoption of that proposal would have meant that any difference in brands, regardless of the actual standing of the products in the market place, would have been conclusive and inquiry into the market facts would have been foreclosed. That was of course not the Congressional intention, for as the court of appeals has pointed out in this present case (R. 982), "Different labels may be of no economic significance whatsoever" and "[i]t is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product."

The legislators made it clear that there was to be no change in the status of brands which commanded higher prices, and which for that reason were different in

grade or quality from non-premium brands. The stated reason for rejecting the "and brands" proposal was to prevent discrimination among private label purchasers. Congress, for example, intended that a packer of canned fruit should not be able to sell that product to one large chain under that company's private label at one price, and at the same time charge any other customer a higher price for the product under its private label.

Mr. Teegarden made the following statement on this subject:

> "To amend the bill by inserting 'and brands', after the words 'commodities of like grade and quality', as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitations whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discrimination that he might demand.
>
> "Under the Patman bill as it stands, *manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under*

his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed." *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 2d Sess., ser. 10, pt. 2, at 469 (1936) [Italics added.]

The attention of Congress could hardly have been focused more specifically upon the precise situation now presented. When the respondent put up evaporated milk under the private labels of the purchasers, and stood ready to do so, under its same cost-plus pricing formula, for each competing purchaser under his private label, it was doing exactly what the chief architect of the Robinson-Patman amendment declared that manufacturers would be free to do thereunder.*

So, too, with the role of *Goodyear*** in the legislative history (Comm. Br. 15-16). It supports the conclusion of the court of appeals, not the Commission's contention. The market facts were gone into on the jurisdictional issue in that case, just as the court of appeals did

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* The obviously offhand statement of Mr. Patman ("I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . .") quoted in part at pages 13-14 of the Commission's brief, is in no way inconsistent. The Commission is in error in suggesting that Mr. Patman was speaking of both grade and quality. He spoke solely of "the same quality", and his statement contains no intimation that products of different grades (*e.g.,* a premium brand and a private label) would have to be sold at the same price. The more considered and definitive statement on the same subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one quoted above, expressly sanctioning the very kind of premium brand-private label operation which is involved in the present case.

** *Goodyear Tire & Rubber Co.,* 22 F.T.C. 232 (1936), *rev'd,* 101 F. 2d 620 (6th Cir.), *cert. denied,* 308 U. S. 557 (1939).

in the present case.* The result was of course different, because the market facts were different.**

B. The court of appeals decision is in full accord with every administrative and judicial precedent.

The court of appeals emphasized in its opinion (R. 982) that different labels may be of great commercial significance or of no economic significance whatever, depending on the facts in each case. As the court put it in *Atalanta Trading Corp.* v. *FTC,* 258 F.2d 365, 371 (2d Cir. 1958), the question is whether the differences between products are merely "artificial" differences or real differences. The issue in that case was whether certain particular pork products, such as "specially packaged gift-wrapped 2¼ and 5 lb. hams," were of like grade and quality with other pork products. In the Commission it had been held that they were, on the ground that "ham is ham"—just as in the present case the Commission has in effect held that evaporated milk is evaporated milk. The court, pointing out among other things that the Commission had failed to take account of the prices at which the products sold, cate-

* FTC Dkt. 2116, Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Respondent's Brief in Support of Motion to Dismiss, pp. 5-9.

** In *Goodyear,* the evidence showed that the private label purchaser (Sears) had in fact been trading on Goodyear's name, thus getting from Goodyear the same commercial value that was obtained by Goodyear customers who had paid a higher price for goods bearing Goodyear's name. The Commission found that in the Sears advertisements "the source of supply was described as 'the leading tire manufacturer' or 'the world's foremost tire manufacturer' "; and that "soon after the contract had been made between Sears, Roebuck & Co. and respondent, that fact became known to the trade and somewhat later to a large proportion of the purchasing public." 22 F.T.C. at 295, 297.

gorically rejected the Commission's decision and set its order aside.

To real people in the market place, the substantial premium differential commanded by Borden brand as compared with private label is most assuredly not an artificial difference. Paying substantially more for one product than for another is a very real thing, to any businessman; he will do that only if the higher priced product is actually worth that much more to him in his business. That is precisely what was done by the private label purchasers in the present case. With both products fully available to them, they kept right on buying Borden brand at the higher prices, in undiminished quantities, as well as private label at the lower prices.

Throughout the history of the Robinson-Patman Act the Commission has recognized—as have the courts—that the higher price commanded by a premium product is a very real thing, and not a mere artificial difference. Time and again, in cases involving the closely related "meeting competition" defense under Section 2(b), the Commission has insisted upon taking full cognizance of the premium differential. Without exception, the Commission has held that because of the premium differential existing in the market place, a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition but undercutting it.

The *Callaway Mills* case (pages 15-16 above) is the most recent example. Rejecting that seller's "meeting competition" defense on the ground that it had failed

to prove that its carpeting was "similar in grade and quality" to the carpeting of the competitors whose prices it was meeting, the Commission emphasized that:

> "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods." CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800, at p. 21755.

Further Commission and court decisions to the same effect include *Standard Oil Co.,* 49 F.T.C. 923 (1953),* *rev'd on other grounds,* 233 F.2d 649 (7th Cir. 1956), *aff'd,* 355 U.S. 396 (1958); *Anheuser-Busch, Inc.,* 54 F.T.C. 277 (1957),** *rev'd,* 265 F.2d 677 (7th Cir. 1959), *rev'd and remanded to court of appeals,* 363 U.S. 536 (1960), *Comm'n again rev'd,* 289 F.2d 835 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co.,* 44 F.T.C. 351 (1948), *rev'd on other grounds,* 191 F.2d 786 (7th Cir. 1951), *petition for cert. dismissed,* 344 U.S. 206 (1952); and *Gerber Prods. Co.* v. *Beech-Nut Life Savers, Inc.,* 160 F. Supp. 916 (S.D.N.Y. 1958).

In each of those decisions the crucial fact was that the premium product commanded a higher price. In

* ". . . in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." 49 F.T.C. at 952.

** "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market". 54 F.T.C. at 302.

none of them did the result turn on any question whether the higher price was due to a greater public demand for the premium product or to some differences in its composition.

In the present case, the Commission has held that the higher price commanded by a premium product is of no significance and must be disregarded in determining the applicability of the statute. The court of appeals could find no warrant for the Commission's thus "construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case" (R. 984); and the Commission in its brief has advanced none. The Commission's attempt to distinguish the long line of precedents (Comm. Br. 25-27) comes down to nothing but an assertion that the standards under Section 2(b) and Section 2(a) of the same statute are "different". In what respect the standards differ, so as to justify a vigorous pursuit of the market facts under Section 2(b) and a total rejection of them under Section 2(a), the Commission does not say.

Equally unpersuasive is the Commission's assertion (Comm. Br. 22-24) that there is a "well-settled administrative interpretation" which may explain its refusal to consider the market facts in this case. The court of appeals, before which the Commission made the same assertion, pointed out that in none of the cases cited by the Commission "was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower price did not." (R. 981-82). The Com-

mission in its brief does not question the accuracy of that statement. Nor does the Commission quote or refer to any instance where the rule now said to be well settled has been stated by the Commission.

A review of the cited cases yields no enlightenment as to any Commission interpretation, let alone any "well settled" one. One of the cases was a negotiated settlement.* In another, the evidence affirmatively showed that there was no commercial difference between the two products, in that the resale prices of both were the same.** In two more, the Commission indicated doubt whether the labels themselves were readily distinguishable.*** In still another, the Commission stipulated facts showing cost justification, as to all issues involving private labels, and the accompanying finding of "like grade and quality" was obviously pro forma.†

C. The court of appeals decision gives effect to the broader antitrust policies that have been laid down by Congress.

The Commission, at page 21 of its brief, recognizes that the widespread distribution of private label merchandise "has enabled millions of consumers to enjoy

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* *United States Rubber Co.*, 28 F.T.C. 1489 (1939).

** *Whitaker Cable Corp.*, 51 F.T.C. 958, 975 (1955).

*** *Hansen Innoculator Co. Inc.*, 26 F.T.C. 303, 308-9 (1938); *Page Dairy Co.*, 50 F.T.C. 395, 397 (1953).

† *United States Rubber Co.*, 46 F.T.C. 998, 1011-12 (1950).

International Salt Co., 49 F.T.C. 138 (1952), to which the Commission makes a "cf." reference, involved no question of different prices for differently labeled goods.

the benefits of lower prices." It must also be recognized that effective competition and resulting lower prices for private label products depend largely upon the freedom of producers to sell these products at prices determined by the demands and conditions of the private label market. Yet the position advocated by the Commission would limit this freedom. If that position were to prevail, producers of a premium product could not also compete in the private label market except at the risk of litigation under the Robinson-Patman Act.

The reasons asserted by the Commission for a position thus limiting competitive freedom are not unlike the reasons which were unsuccessfully asserted in *Automatic Canteen Co.* v. *FTC,* 346 U.S. 61 (1953). There the issue was whether, in a proceeding under Section 2(f) of the Robinson-Patman Act, the Commission or the defending recipient of a lower price had the burden of coming forward with facts as to the seller's costs and other evidence. The Commission argued that enforcement of the Act would be simplified if that burden were put on the defending recipient rather than on the Commission—just as the Commission in the present case seeks a simple exclusionary rule under which the Commission would not have to consider any of the market facts in determining the applicability of the statute.

This Court rejected the Commission's contention. It pointed out that the simplified enforcement sought by the Commission "might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." (*id* at 63.)

The freedom of competition was protected by the Court's refusal to put "the buyer at his peril whenever he engages in price bargaining." (*id* at 73.) The basic point of the decision was that the Robinson-Patman Act should be interpreted and applied consistently "with the broader antitrust policies that have been laid down by Congress." (*id* at 74.)

Similar considerations are applicable here, as the court of appeals noted (R. 980-81). Under the simple rule sought by the Commission, a producer who happened also to be in the premium brand market would be foreclosed from competing, in the private label market, with an eye solely to the market for the private label product. He would in addition have to be mindful of the competitive fortunes and situations of each of his competitors and customers, all at the risk of protracted and expensive litigation and at the peril of severe restrictive orders if it should later be concluded that "the competitive balance" was "shifted" (Comm. Br. 6). The scope of that risk and the reality of the peril are made clear by the long history of this litigation and the sweeping order issued by the Commission (R. 952-53).*

Nothing in the Robinson-Patman Act justifies the conclusion that Congress intended such an impact on

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* In its brief (pages 17-18) the Commission goes outside the record for some materials which are said to indicate a more widespread interest in private brand merchandise, generally, than the record facts show with respect to evaporated milk. That, we suggest, would make it even more imperative that all potential producers of private label be permitted to compete fully and effectively in such markets, without being subjected to the restrictions inherent in the exclusionary rule for which the Commission contends in this case.

competition. Section 2(a) of the Robinson-Patman Act, applied in accordance with its terms, imposes restrictions on price differentiation only in those situations where the market itself does not make a differentiation; that is to say, only in those situations where a seller sells to one purchaser at a higher price, and to another purchaser at a lower price, like goods which would normally command the same price.

But where as in this present case the market itself dictates that the products be sold at different prices, and a seller must sell the one at a lower price if he is to sell it at all, the statute has no application whatsoever and imposes no actual or threatened restriction of any kind on a seller's full and effective competition in each of the product markets. He is free to make private label available to all of his customers who want that product, without regard to any effect that that may have on competitors presently supplying any of such customers; and he is free to sell that product at lower prices reflecting and making available for consumers the benefits of plant location and other economic advantages that he may have.

D. The court of appeals decision is in full accord with the overall statutory design.

The statutory design is perfectly clear. Unless products are alike in grade and quality, the statute has no application whatsoever in respect of a seller's pricing of them, and no inquiry under the injury or any of the other provisions of the statute is authorized or contemplated.

As the Commission puts it:

> "Congress explicitly did not prohibit a seller from charging less for a different product." (Pet. Cert. 9) * * * * *
>
> "A seller may charge different prices for products having significant variations in grade and quality —such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act." (Comm. Br. 12)

Comparison of this present case with the situation presented in *FTC* v. *Morton Salt Co.,* 334 U.S. 37 (1948), relied upon by the Commission (Comm. Br. 17, 19), illustrates the difference in kind between the competitive effects of selling different products at different prices, and the injurious impact of selling the same product at different prices.

In *Morton Salt* the goods sold to competing customers at different prices were alike in the market place as well as in physical composition. This Court, repeatedly characterizing these as "like goods",* made it clear that one of the things that made them "like goods" was that the brand name was the same: Morton's "finest brand of table salt, known as Blue Label." After setting out at page 41 the volume discount schedule applicable to "this brand" and noting that the record in that case showed that there had been only five companies able to purchase at the lowest prices thus provided for, this Court stated that:

> "As a result of this low price these five companies have been able to sell Blue Label salt at retail

* 334 U.S. at 45, 47, 50.

> cheaper than wholesale purchasers from respondent could reasonably sell *the same brand* of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores."* [Italics added.]

It was self-evident that both groups of customers—those charged the higher prices and those charged the lower prices—would ordinarily expect to pay the same price for that Blue Label salt. It was likewise self-evident that both groups of customers in fact wanted Blue Label salt. They were already buying it. And, as noted in the foregoing quotation from this Court's opinion, the competitive disadvantage to those paying the higher price for that same brand of salt was equally obvious.

In the present case, in total contrast, the goods were quite unlike in the market place. No wholesaler or retailer expected to get Borden brand for the private label price. All wholesalers and retailers carried Borden brand. Their customers demanded it, and it was a necessary part of their stock in trade. Private label was an optional item; some chose to carry it and some did not. Borden brand was a pre-sold item, requiring little selling effort on the part of the handlers. Private label on the other hand required extensive selling and promotional efforts, and the record shows that those who did handle the product did not always

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* Following this, this Court at page 41 described the quantity discount system applicable to Morton's "other brands" of table salt, and noted the price differences among purchasers of such other brands.

consider that their efforts had been warranted. On the other hand the mark-ups for the handlers, on Borden brand, were modest, while in some circumstances the handling of private label held out the hope of greater margins. Private label also provided an opportunity for a handler to develop a good will in a product of his own; Borden brand did not (R. 51-57, 431-35, 455-56, 464-65, 478-81).

The hearing examiner, who observed the Commission's wholesaler and retailer witnesses on the stand and analyzed the evidence in detail, found the Commission's case thoroughly unpersuasive and held that there was no competitive injury.* The Commission, proceeding on the erroneous premise that this was another *Morton Salt* case, involving goods which were alike in the market place as well as in physical composition, concluded otherwise. The court of appeals, while not deciding the question, stated that the respondent's arguments in support of the hearing examiner's conclusion "seem to have considerable merit" (R. 985).

For present purposes the important point is that (as the Commission admits) the Congress did not intend

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* R. 57. The hearing examiner considered the statements of the Commission's witnesses, referred to at page 7 of its brief, to the effect that they would have been interested in buying private label from the respondent if they had been solicited. He also considered the evidence as to the actual business conduct of these witnesses, including evidence showing that most of them had never handled private label at all, although it had been in distribution in their area for over 30 years, evidence showing that many of the retailer witnesses had failed to buy the product when it was offered to them by wholesalers purchasing from the respondent (or had waited to do so, until shortly before their testimony), etc. (R. 50-57, 288-90).

that any competitive effects flowing from the selling of different products at different prices should be inquired into at all. They are not "the kind" of effects with which Congress was concerned (Comm. Br. 12). And the facts in this case clearly show that where, as here, the products are radically different in the market place, any competitive effects are indeed different in kind from the *Morton Salt* type to which the statute is directed.

We submit that Congress did not intend, on the one hand, to leave a seller free to sell different products at competitively different prices, and then on the other hand to take away that freedom by permitting the Commission to subject the seller to protracted and uncertain litigation about alleged competitive effects. Cf. *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

II. The Court of Appeals Decision Leaves the Commission Entirely Free to Discharge all of its Responsibilities under the Statute, as Congress Intended.

Much of the argument in the Commission's brief is directed to a concern that the decision below may impede the Commission in its handling of other cases which may arise in the future.

The effect of the court of appeals decision, so far as future cases are concerned, is simply to reconfirm that market as well as physical facts are to be taken into account. The decision leaves the Commission free, as always, to consider each new case on its own facts. Where such facts indicate mere artificial differences rather than the genuinely significant differences shown

in this present case, the Commission as always will have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

If examples are needed, the court of appeals has already furnished one. In *Hartley & Parker** the court of appeals found the differently labeled goods to be of like grade and quality. That conclusion, reached on the facts of that case, in no way tied the court's hands in respect of the quite different market facts in the present case; and Judge Rives, who wrote the opinion in *Hartley,* joined in the unanimous decision in the present case.

If and when another *Goodyear* situation arises (see pages 21-22 above), with a single large purchaser of private label buying at a lower price but trading on and getting the benefit of the well-known brand name, nothing in the decision below will hamper the Commission in dealing fully and effectively with that case.

So too, with the hypothetical situation posed at page 19 of the Commission's brief, involving a supposed predatory use accomplished by "simply . . . calling it Brand X instead of Brand A." The court of appeals made it clear that the mere affixing of different labels means nothing at all, because "different labels may be of no economic significance whatsoever" (R. 982). The facts in the present case are totally different, and it is hard to see how the decision below could give rise to any problem in dealing with the hypothetical case if it should arise.

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* *Hartley & Parker, Inc.* v. *Florida Beverage Corp.,* 307 F.2d 916 (5th Cir. 1962).

But even if it were to be thought that consideration of the market as well as the physical facts might call for some substantial amount of effort on the Commission's part, that could by no means justify the alternative, of which this case is an example: eight years of complex and expensive litigation about competitive effects claimed to have flowed from the differential pricing of products which were radically different in the market place, pursuing the complexities involved in establishing cost justification under the Commission's procedures, etc. Inquiry into the market facts at the outset, as Congress intended, could have obviated all of this with but a small fraction of the time and effort.

Conclusion

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: December 30, 1965